

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

ePLUS, INC., : Civil Action No.
vs. : 3:09CV620
LAWSON SOFTWARE, INC. : May 18, 2010

COMPLETE TRANSCRIPT OF THE CONFERENCE CALL
BEFORE THE HONORABLE ROBERT E. PAYNE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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THE COURT: Hello.

MR. WILLETT: Good morning -- or good afternoon, Judge Payne. You have Henry Willett and Scott Robertson on the line for ePlus and Dabney Carr on the line for Lawson.

MR. CARR: Good afternoon, Judge.

THE COURT: What about your other people for Lawson?

MR. CARR: It's just going to be me today, Judge.

THE COURT: All right. Well, the -- I've got ePlus's request for expedited treatment for a motion to strike portions of the expert report and exclude from trial the alleged prior art and invalidity arguments that weren't disclosed in the Court-ordered invalidity contentions, and I actually have responses on the expedited part of it, the expedited issue and a reply.

Now, there's a substantive aspect to it, and ePlus has filed its motion -- I mean its brief in support of that motion. Lawson has not. Am I correct in that regard?

MR. CARR: Your Honor, for Lawson, we have not responded to the substance of the motion to strike; that's correct.

THE COURT: But in your response to the motion for expedited treatment, you don't deny that there are materials that are not disclosed in your invalidity contentions in this

expert's report. What is his name, how do you pronounce it; Seamus?

MR. CARR: Seamus, yes, Your Honor, but, Your Honor, we did not address the merits at all in our response, so when ePlus says in reply that we didn't deny something, that would be true because it was not a response-to-the-merits brief.

THE COURT: Okay.

MR. CARR: And we don't think that we should be required to respond to the merits of this in what is two business days. We have talked with ePlus just a few minutes ago about the briefing schedule, and we are pretty close to a resolution on that.

Where we left it was that we had agreed that our response would be due this Friday, and the only point of dispute between the two parties was whether or not ePlus's reply brief on the merits would be due on Monday, which would be the time that the rules allow, three days from the filing of the response, or they have asked that that should be on Tuesday, and we did not agree to that, and I'll tell you the reason I didn't agree with that is I couldn't understand that how an emergency motion, ePlus would get four days for its reply rather than the three that the rules allow. And so I just didn't feel like we could agree to that.

MR. ROBERTSON: Your Honor, this is Mr. Robertson. I made the proposal just now. I thought that if we could agree

1 on something, that we could save the Court some trouble and
2 time. My proposal was that their opposition be due on
3 Thursday, and then my reply would be due on the following
4 Monday. I can live with that.

5 I just need to get this resolved, Your Honor, because
6 we have an invalidity rebuttal report that we have to file, and
7 with all these new prior art issues coming into the case, it's
8 problematic. I can tell Your Honor, I just jumped out of a
9 deposition. We are triple tracking today and will be doing so
10 pretty much through the now extended discovery period on many
11 days, and it's just very difficult for us when we're faced with
12 this issue that I think we've probably argued five times now
13 before Your Honor as to whether or not they get to add new
14 invalidity contentions.

15 I'd like to add new claims to my case, but Your Honor
16 told me I have 13, and I've lived with that. If I could have
17 another 50 more, I'd take it, but Your Honor spoke, and I
18 followed. I wish they would do the same.

19 MR. CARR: Your Honor, again, I think the merits are
20 for another day. Really what's before you is the briefing
21 schedule, and we offered to move it from Tuesday when it would
22 otherwise be due which, Judge, is still more than two weeks
23 before their --

24 THE COURT: But you all have have ignored -- you've
25 ignored a salient issue.

07:16PM 1 MR. CARR: Yes, Your Honor.

07:16PM 2 THE COURT: I'm not going to be here from May 26th
07:20PM 3 until June 9th.

07:22PM 4 MR. CARR: Sorry, Your Honor. I wasn't aware of
07:24PM 5 that.

07:24PM 6 THE COURT: Then I'm going to be here only a couple
07:26PM 7 of days, and then I'm gone again for the weekend. And so I
07:32PM 8 don't have time for this. I don't see why -- what I want you
07:36PM 9 to do, Mr. Robertson -- I'm surprised you didn't do it -- I
07:40PM 10 want you to take that man's report, and I want you to highlight
07:46PM 11 for me everything in it that's new, that wasn't disclosed.

07:52PM 12 MR. ROBERTSON: Your Honor, I believe it might be one
07:54PM 13 of the exhibits. I asked my paralegal to do a yellow highlight
07:58PM 14 on all the new manuals that have been added that weren't
08:00PM 15 disclosed earlier and all the references. In fact, the brief
08:04PM 16 spells out exactly the new references are not there. Let me
08:06PM 17 just highlight one for Your Honor. It's this Lawson version
08:08PM 18 6.0 --

08:10PM 19 THE COURT: Our stuff doesn't have any highlighting
08:12PM 20 on it. We can't tell. I'm going to tell you something right
08:18PM 21 now. If it's not -- if something is not disclosed in those
08:22PM 22 schedules, it's not going to be considered, period. That's
08:26PM 23 just the way it's going to happen, Mr. Carr, and you're going
08:30PM 24 to have to show me with reciprocal highlighting in the
08:38PM 25 supplemental contentions where it actually is specified.

08:46PM 1 You're going to have to do that, and if it's not
08:48PM 2 there, I'm not even going to pay attention to it because --

08:52PM 3 MR. CARR: Your Honor, again, I think there are some
08:52PM 4 arguments here that --

08:54PM 5 THE COURT: No arguments. It's either there or it's
08:58PM 6 not there. And I mean it's there in words that I can
09:02PM 7 understand, and it doesn't have to be discerned by waiving a
09:06PM 8 Ouija board over it.

09:08PM 9 MR. CARR: Let me give you an example if we're going
09:10PM 10 to get to the merits here what I think is something I think is
09:12PM 11 being missed here. One of the complaints ePlus has made is
09:16PM 12 that the precise documents addressing a particular piece of
09:20PM 13 prior art -- let's take SABRE as an example -- that our experts
09:24PM 14 cited different documents than were cited in the invalidity
09:28PM 15 contentions.

09:28PM 16 Now, you did not order or state in your order in the
09:30PM 17 call on March 26th, and I just read that transcript again this
09:34PM 18 morning, or in the order that followed that, that our expert
09:38PM 19 would be limited to relying only on the documents that will be
09:42PM 20 cited in the invalidity contentions. If that was the intent of
09:46PM 21 your order, we just went on notice of it.

09:50PM 22 THE COURT: Mr. Carr, you all are playing cute --

09:50PM 23 MR. CARR: I'm not trying to --

09:52PM 24 THE COURT: -- and you're going to get caught playing
09:56PM 25 cute.

09:56PM 1 MR. CARR: -- to play cute, but --

09:56PM 2 THE COURT: Be quiet. You can't talk but one at a

09:58PM 3 time.

09:58PM 4 MR. CARR: I apologize.

10:00PM 5 THE COURT: You file your -- what is today? Tuesday?

10:04PM 6 MR. CARR: Correct.

10:04PM 7 THE COURT: You file your response to this tomorrow,

10:06PM 8 and you file your reply to it the day after that. And you

10:12PM 9 mark --

10:12PM 10 MR. CARR: That's going to be very difficult for us

10:14PM 11 given the deposition schedule, but we'll meet that schedule.

10:18PM 12 THE COURT: Well, I'm sure that you all have got

10:20PM 13 plenty of people that can do it, and it's not that hard to do,

10:24PM 14 and you've to highlight it.

10:26PM 15 MR. CARR: Well, Your Honor, I've got to point out

10:28PM 16 that ePlus took ten days to file this motion, and we're getting

10:32PM 17 three to file our response.

10:32PM 18 THE COURT: You know, I don't care.

10:34PM 19 MR. CARR: I understand that.

10:36PM 20 THE COURT: What I care about is having you obey the

10:38PM 21 orders to begin with.

10:40PM 22 MR. CARR: Your Honor, I've just got to say, there

10:42PM 23 are two sides to this story.

10:44PM 24 THE COURT: There are to every one, and that's why I

10:48PM 25 want to see, but the easy way to do it is that you show me the

10:52PM 1 new stuff highlighted, Mr. Robertson -- if it's in there, I
10:54PM 2 can't tell it -- so I can go right to it and see. I don't want
10:58PM 3 a bunch of verbiage around it. I want to be able to see
11:02PM 4 cleanly and clearly, this is new.

11:06PM 5 MR. ROBERTSON: I will do that, Your Honor.

11:08PM 6 THE COURT: And then you do yours in the contention
11:10PM 7 saying this is where Seamus's report, page seven, that he
11:24PM 8 identifies as not in the report actually is -- or not in the
11:28PM 9 contentions is in the contentions, and if it's not there, it
11:30PM 10 isn't coming in.

11:32PM 11 And just keep yourself some separate time records and
11:38PM 12 attorney's fees records for all this, and we'll deal with all
11:42PM 13 this later. But I'm -- and I don't believe, what I don't
11:46PM 14 believe is what I'm reading in these papers that experts are
11:50PM 15 talking about hundreds of pages of documents and claim charts,
11:54PM 16 and I'm going to tell you, we're not going to have it. I don't
11:58PM 17 know what they're doing.

12:00PM 18 I'll wait and reserve judgment on what it is your
12:04PM 19 experts think they're doing, but you run the risk that all of
12:08PM 20 this will be out of the case if you are larding stuff up,
12:12PM 21 either side, both sides, and putting in the things that make
12:18PM 22 this case ununderstandable and un-triable to a jury and confuse
12:22PM 23 the jury.

12:24PM 24 The remedy I'm going to take is to bounce your
12:28PM 25 expert's testimony and get rid of it.

12:32PM 1 MR. CARR: Your Honor, looking forward a little bit,
12:34PM 2 if we're doing our response tomorrow and their reply on
12:36PM 3 Thursday, do you want to set up a call to rule on the motions
12:40PM 4 before you leave?

12:40PM 5 THE COURT: I'm going to have to.

12:42PM 6 MR. CARR: Can we go ahead and do that now?

12:46PM 7 THE COURT: I'm not going to do a call.

12:50PM 8 MR. ROBERTSON: Judge?

12:54PM 9 THE COURT: Just a minute.

13:18PM 10 THE COURT: I'll see you all at 1:30 on Monday,
13:24PM 11 May 24th.

13:28PM 12 MR. ROBERTSON: Your Honor, this is Mr. Robertson.
13:30PM 13 One last point so Your Honor is not surprised, I have the
13:34PM 14 Seamus report on my lap right now. It's as thick as the New
13:36PM 15 York telephone book, so you're going to be getting something
13:40PM 16 that is going to have a lot of flags and a lot of yellow
13:42PM 17 highlighting on it.

13:44PM 18 THE COURT: It's bigger than the New York telephone
13:46PM 19 book?

13:46PM 20 MR. CARR: Your Honor, that's a gross overstatement.

13:50PM 21 THE COURT: How about is it as big as the Richmond
13:54PM 22 telephone book?

13:56PM 23 MR. CARR: It's not near that, Your Honor, and I'll
13:58PM 24 say, Your Honor, it's no longer than Dr. Weaver's infringement
14:02PM 25 report that ePlus issued. This is all a lot of overstatement

14:06PM 1 by Mr. Robertson.

14:08PM 2 MR. ROBERTSON: Well, Your Honor can see for
14:10PM 3 yourself, I mean, you know, and the document will speak for
14:12PM 4 itself just as Mr. McDonald said, and you can tell whether it
14:16PM 5 was in the contentions or not. I'll stand by that.

14:18PM 6 MR. CARR: Your Honor, I think we're also now going
14:22PM 7 to have to address whether ePlus has done the same thing with
14:24PM 8 Dr. Weaver's report.

14:26PM 9 THE COURT: I haven't got that in front of me, and
14:28PM 10 until I have something in front of me, I don't rule.

14:30PM 11 MR. CARR: We'll try to put it in front of you just
14:34PM 12 as soon as I can, Your Honor.

14:36PM 13 THE COURT: I learned from Judge Merhige not to rule
14:38PM 14 on things that you haven't read or haven't considered and to
14:42PM 15 kill a snake where you find it, two very good lessons.

14:46PM 16 All right, I'll see you. Get it over here. And, Mr.
14:50PM 17 Robertson, you're going to have to get that done right away.
14:54PM 18 You tell me it's already done, but I don't see it.

14:58PM 19 MR. ROBERTSON: I'll get right on it, Your Honor.

14:58PM 20 MR. CARR: Your Honor, we'll get our response filed
15:02PM 21 tomorrow.

15:02PM 22 THE COURT: Thank you. Good-bye.

15:02PM 23 MR. CARR: Thank you.

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25 (End of proceedings.)

Date _____